86-390

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULTIMEDIA, INC.,

Petitioner,

v.

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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September 10, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

This case involves a lawsuit against the owner of a newspaper for the tort of invasion of privacy by virtue of public disclosure of allegedly private facts. The questions presented are:

1. In such an action, do the First and Fourteenth Amendments to the United States Constitution require that the trial judge determine in the first instance whether the publication was privileged because it involved a matter of public interest?

2. In such an action, do the First and Fourteenth Amendments to the United States Constitution require the plaintiff to prove the absence of public interest and a variant of "actual malice" and to do so by clear and convincing evidence?

3. In such an action, if the general subject of the publication admittedly deals with a matter of public interest, is there a privilege under the First and Fourteenth Amendments to the United States Constitution to identify a participant in a case history used to illustrate the general subject of the publication?

RULE 28.1 LIST

Multimedia Cablevision of Oak Lawn, Inc.

Multimedia Cablevision of Alsip, Inc.

Multimedia Cablevision of Batavia, Inc.

Multimedia Cablevision of Chicago Ridge, Inc.

Multimedia Cablevision of Evergreen Park, Inc.

Multimedia Cablevision of Harvey, Inc.

Multimedia Cablevision of Hometown, Inc.

Multimedia Cablevision of Lisle, Inc.

Multimedia Cablevision of Markham, Inc.

Multimedia Cablevision of Oak Forest, Inc.

Multimedia Cablevision of Phoenix, Inc.

Multimedia Cablevision of South Holland, Inc.

Multimedia Cablevision of Villa Park, Inc.

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No. ———

MULTIMEDIA, INC.,

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CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The petitioner Multimedia, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina, entered in the above-captioned proceeding on March 11, 1986.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 288 S.C. 569, 344 S.E.2d 145. It is reprinted in the appendix hereto, *infra* at 1a.

The order of the trial court denying the petitioner's post-trial motions and entering judgment on the verdict has not been reported; it is reprinted in the appendix hereto, *infra* at 5a.

JURISDICTION

The South Carolina Supreme Court entered judgment on March 11, 1986, affirming the trial court's judgment on the verdict for the respondent. On May 13, 1986, the state supreme court denied the petitioner's timely petition for rehearing. *See infra* at 4a. On July 25, 1986, Chief Justice Burger signed an order extending the time for filing this petition for certiorari to and including September 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITIONAL PROVISIONS INVOLVED

U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Const. amend. XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

This action arises from the petitioner's publication, through one of its newspapers, of an article concerning the medical and social problems resulting from pregnancies among unwed teenage mothers. As a "side-bar," or related article to a general article on the subject, the newspaper printed a story that focused on a local case history of an unwed teenage mother. The "side-bar" article identified the respondent as the father of the illegitimate child. *See infra* at 10a, 16a.

Claiming invasion of privacy by virtue of public disclosure of allegedly private facts, the respondent brought suit in South Carolina state court against the petitioner several months after the publication of the article. The truthfulness and accuracy of the published facts were

never controverted.[1] Nor was there ever any dispute that the general subject of pregancies among unwed teenage mothers was a matter of important public concern.[2] Nevertheless, the trial judge permitted the case to go to the jury, which returned a verdict for the respondent for $1,500 in actual damages and $25,000 in punitive damages. The trial judge entered judgment on the verdict, and the South Carolina Supreme Court affirmed that judgment.[3]

Throughout the litigation the petition contended that the United States Constitution required that the respondent prove both the absence of public interest and a type of actual malice appropriate to this variety of invasion of privacy lawsuit,[4] and to do so in each instance by clear

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[1] Falsity or inaccuracy is not an element of the tort of publication of private facts. In South Carolina, the tort is defined as the "publicizing of one's private affairs with which the public has no legitimate concern" and which is "of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence." *Meetze v. Associated Press*, 230 S.C. 330, 335, 338, 95 S.E.2d 606, 608, 610 (1956). The jury was correctly instructed as to the elements of the tort. *See* Transcript of Record 225. The definition of the tort under South Carolina law is essentially the same as that in the other states that have recognized the tort. *See* Restatement (Second) of Torts § 652D (1977). The tort is recognized in nearly every state. *See* Prosser, *Privacy*, 48 Calif. L. Rev. 383, 386-88 (1960).

[2] The jury was instructed that

> "it's conceded that the question of illegitimate children is of public interest. However, the plaintiff takes the position that the identification of the plaintiff[] is an unwarranted intrusion of [his] privacy because [he himself is] not of a public interest, and [his] having illegitimate children or being the father . . . of an illegitimate child is not of a public interest."

Transcript of Record 227.

[3] The respondent's mother also brought suit on similar grounds, and her case was tried with that of her son. The jury declined to award her any damages, however, and she did not appeal.

[4] There are four distinct invasion of privacy torts—intrusion upon the plaintiff's physical solitude or seclusion, placing the plaintiff in a

and convincing evidence.[5] The petitioner also asserted that the trial judge was constitutionally required to accord "special scrutiny" to these issues.[6] In moving for a directed verdict, the petitioner argued generally that the trial judge should hold as a matter of federal constitutional law that the publication concerned a matter of legitimate public interest and therefore was privileged;[7] the petitioner also argued that the respondent had not met his burden of proof with regard to actual malice.[8] The trial judge denied the petitioner's motion for a directed verdict without elaborating on his reasons for doing so. The petitioner presented the same arguments in its motion for judgment notwithstanding the verdict.[9] The trial judge denied this motion, ruling that the issue of public interest is a question of fact to be determined solely by the jury, that no proof of any variant of actual malice is necessary to establish the type of invasion of privacy alleged in this action, and that it was appropriate to send the case to the jury rather than rule as a matter of law that the publication was constitutionally privileged.[10]

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false light in the public eye, appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage, and public disclosure of true facts about the plaintiff that are not of legitimate public interest. *See, e.g.*, Restatement (Second) of Torts § 652A (1977). The last such variety is the tort involved in the instant action. Because public interest rather than truth is the cornerstone to a successful defense to a lawsuit alleging that tort, the petitioner proffered a modified definition of the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Trial Brief of Defendant 9.

[5] *See* Trial Brief of Defendant 4-10.

[6] *See id.* at 10-11.

[7] *See* Transcript of Record 213-14.

[8] *See id.*

[9] *See* Memorandum in Support of Defendant's Trial Motions and in Opposition to Plaintiff Linda Hawkins' Trial Motion 1-2, 3.

[10] *See infra* at 5a-6a.

The petitioner raised the same issues (among others) on appeal.[11] The supreme court's opinion affirming the judgment of the trial court mirrored the reasoning of the latter in holding that the issue of public interest is solely for the jury to decide, that no form of actual malice need be shown to recover for this type of invasion of privacy, and that there was no error in sending the case to the jury.[12]

REASONS FOR GRANTING THE WRIT

The issues presented by this case are worthy of this Court's review for three reasons: (1) they have been left unresolved by this Court's decisions; (2) state courts and lower federal courts have reached conflicting results and developed conflicting standards as to the issues presented; and (3) resolution of the issues by this Court is necessary to provide guidance to the broadcasting and publishing media in reporting on matters of public concern.

I. The questions presented by this petition have been left unresolved by this Court's decisions.

The notion that a person may be held liable for publishing facts that are completely truthful and accurate, and that relate to a pressing social problem, is a startling idea.[13] This Court has frequently stated that truth is an

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[11] *See* Transcript of Record [as submitted to the state supreme court] 158 ("Exception II"), 160-61 ("Exception V," "Exception VI," and "Exception VII"); Brief of Appellant 16-27.

[12] *See infra* at 3a.

[13] It is especially startling in the present case. The effect of the decisions below is that young men who become involved in out-of-wedlock pregnancies will have legal advantages not available to young women in the same situation. All the world knows of the young woman's involvement because she cannot hide her condition. Accordingly, publication of her name is not a public disclosure of a hitherto private fact, and she has no potential lawsuit. The young man, on the other hand, is physically able to conceal his involvement. If he chooses to do so by shirking his responsibility to care

absolute defense from civil or criminal liability based upon speech. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, —— U.S. ——, ——, 106 S. Ct. 1558, 1559 (1986); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *cf. Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979) ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."). On the other hand, the Court has not foreclosed the possibility of civil liability for publication of the truth. *See Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967); *Garrison, supra*, at 72 & n.3.[14]

None of this Court's decisions addresses the issues presented by this petition. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), is the only decision of this Court dealing with the particular type of invasion of privacy action involved in the instant case. There the Court held that a person could not constitutionally be held liable under this tort for publicizing the name of a rape victim obtained from public records. The Court deliberately kept its holding narrow, however, *see id.* at 491, 497 n.27, and its reasoning is heavily dependent on the specific fact that records of judicial proceedings were involved, *see id.* at 491-93. The Court has dealt twice with the constitutional

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for the child whom he fathered, as the respondent did in this case, see Transcript of Record [as submitted to the state supreme court] 94-95, under the decisions below not only is he able to escape public judgment for his conduct, but also he has a cause of action against one who, by disclosing his involvement, puts him on equal footing with the mother of his child. Such a sanctuary of anonymity does nothing to assist society in coping with this most pressing problem, but rather creates an atmosphere within which the problem may be expected to flourish.

[14] Commentators have questioned whether any form of tort liability for publicizing true facts can stand in the face of the constitutional protections for speech and press. *See* B. Sanford, Libel & Privacy: The Prevention and Defense of Litigation 459 (1985); Restatement (Second) of Torts § 652D special note (1977).

implications of civil liability for invasion of privacy based on the claim that a publication placed the plaintiff in a false light. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Hill, supra.* Such lawsuits are obviously more akin to defamation actions than to "private facts/public concern" actions. Thus, although the Court has "flirted" with the issue, "[t]he reach of the First Amendment in the private facts context is as yet unresolved . . . ." B. Sanford, *supra* note 14, at 442-43.

II. State courts and lower federal courts have reached conflicting results and developed conflicting standards as to the questions presented.

There is a direct conflict among the state and lower federal courts on the issue whether the question of public interest is for the judge to decide in the first instance or for the jury alone. In holding that the issue is one for the jury alone, the South Carolina Supreme Court has aligned itself with the decisions in *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 & n.13 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Briscoe v. Readers Digest Association, Inc.*, 4 Cal. 3d 529, 93 Cal. Rptr. 866, 875, 483 P.2d 34 (1971); and *Diaz v. Oakland Tribune*, 9 Med. L. Rptr. 1121, 1127 (Cal. App. 1983).

These holdings conflict directly with *Barber v. Time*, 159 S.W.2d 291, 1 Med. L. Rptr. 1779, 1782 (Mo. 1942); and *Williams v. KCMO Broadcasting Division*, 472 S.W.2d 1, 56 A.L.R.3d 378, 381 (Mo. App. 1971). In addition, in *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 459, *cert. denied*, 423 U.S. 1025 (1975), the Colorado Supreme Court held in the context of a defamation action brought by a private individual that the issue whether the defamatory statements concerned a matter of public interest or concern is a question of law for the judge to decide. That holding would apply *a fortiori* in a "private facts/public concern" lawsuit. And in *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980), and *McNutt v. New Mexico State Tri-*

bune, 538 P.2d 804, 84 A.L.R.3d 1148 (N.M. 1975), the courts treated the issue as one of law without expressly holding to that effect. *See Campbell* at 397; *McNutt* at 807-09, 84 A.L.R.3d at 1152-55, 1157; *see also Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 & n.1 (10th Cir. 1981) (issue may be left to jury "in some cases," but Constitution requires closer judicial scrutiny of this issue than is usual for fact issues).

There is no direct conflict on the issue whether the Constitution requires clear and convincing proof of actual malice or absence of public interest. The holding below that *no* proof of actual malice is necessary to establish invasion of privacy, however, does conflict with the decisions of four other courts. *See Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1290 (D.D.C. 1981); *Briscoe, supra*, 93 Cal. Rptr. at 875-76; *Taylor v. K.T.V.B., Inc.*, 96 Idaho 202, 525 P.2d 984, 987-88 (1974); *McNutt, supra*, 84 A.L.R.3d at 1157. Each of these four courts held, as a matter of federal constitutional law, that some form of actual malice is necessary to hold a person liable in a "private facts/public concern" action.

The court below rejected the petitioner's argument that the newspaper had a constitutional privilege to identify the respondent in the side-bar article in order to illustrate the general subject of the main article. The court recognized that, under state law, there is no liability for publishing true facts concerning matters of public interest. *See infra* at 3a. It was undisputed that the general subject was one of legitimate public interest.[15] Thus, implicit in the state supreme court's rejection of the petitioner's argument on this point is the view that, while the general subject was of public interest, it was for the jury alone to decide whether the identification of the respondent was a matter of public interest. Other courts have applied this reasoning in similar cases. *See Briscoe, supra*, at 872; *Barber, supra*, at 1783.

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[15] *See supra* note 2.

This approach conflicts substantially with the logic applied, as a matter of federal constitutional law, by a number of other state and federal courts in analogous situations. *See Gilbert, supra,* at 308; *Dresbach, supra,* at 1291; *Neff v. Time, Inc.,* 406 F. Supp. 858, 861 (W.D. Pa. 1976); *Howard v. Des Moines Register,* 283 N.W.2d 289, 5 Med. L. Rptr. 1667, 1677 (Iowa 1979), *cert. denied,* 445 U.S. 904 (1980). The rationale underlying these decisions is well stated in the *Howard* opinion:

> "Plaintiff concedes the article in this case was newsworthy, but she asserts the disclosure of her identity was not. We do not believe the disclosure of her identity can be taken out of context.
>
> ". . . .
>
> "In the sense of serving an appropriate news function, the disclosure contributed constructively to the impact of the article. It offered a personalized frame of reference to which the reader could relate, fostering perception and understanding. Moreover, it lent specificity and credibility to the report.
>
> "In this way the disclosure served as an effective means of accomplishing the intended news function. It had positive communicative value in attracting the reader's attention to the article's subject matter and in supporting expression of the underlying theme.
>
> "Examined in the light of the first amendment, we do not believe the disclosure could reasonably be held to be devoid of news value." *Id.*

The conflict just discussed is not a direct conflict on the precise constitutional issue presented by the petitioner, and the holdings of these courts were closely tied to the facts of the individual cases. Nevertheless, the factual situations were sufficiently similar, and the courts' approaches sufficiently disparate, that it can be said with confidence that the *Gilbert, Dresbach, Neff,* and *Howard* courts would have resolved the instant case differently. Given the special need for coherence and predictability in

this area, *see infra* at 10-12, the conflict in principle reflected in these decisions warrants review by this Court.

III. This Court's resolution of the questions presented is necessary to provide guidance to the broadcasting and publishing media in reporting on matters of public concern.

One commentator has noted that, although defamation suits tend to be brought more frequently than invasion of privacy suits, "there is no doubt that editors tend to be more interested, even fearful, of the contemporary world of invasion of privacy than the time-worn terrain of libel." B. Sanford, *supra* note 14, at 427. Undoubtedly one reason for this fear is the uncertainty generated from both the lack of guidance from this Court and the conflicting standards among the lower courts, as discussed above. Another reason, perhaps the major reason, for the great uncertainty in this area, *see generally id.* at 428, lies in the nature of the tort itself: in most cases it is relatively easy to determine if a statement is defamatory and false, but determining whether a truthful fact might be considered a "private fact" that is of no legitimate public interest and that is offensive to the reasonable person is a subjective and speculative affair.

This Court, as well as individual Justices and commentators, has noted the special need for predictability and coherence in areas of the law in which there is a deterrent effect on the exercise of the rights of freedom of speech and of the press. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974); *id.* at 354 (Blackmun, J., concurring); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting); L. Tribe, American Constitutional Law § 12-13 at 645-46 (1978).[16]

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[16] Accordingly, this Court has at times found it desirable to articulate specific "rules of the road" in order to provide guidance for the news media. *See Cox Broadcasting, supra* (presumption that material on the public record is a matter of public interest); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (charge of criminal conduct is never irrelevant to official's or candidate's fitness for

Review of the questions presented by this petition would provide the Court the opportunity to lend greater certainty to this area of law in two ways. First, simply resolving the conflicts discussed above, even in a manner adverse to the petitioner's position, would assist publishers in making decisions on articles about matters of public concern that carry with them potential liability for invasion of privacy. Second, adopting the constitutional rules advocated by the petitioner would further certainty and predictability in this area of law, as well as allow full discussion of public issues without limiting the rights of individuals other than those involved with the issues.

This Court has at times expressed dissatisfaction with using "public interest" as a constitutional criterion. *See Gertz, supra,* at 346; *Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976). *But see Hepps, supra,* at ——, 106 S. Ct. at 1564. This dissatisfaction stems from an understandable reluctance to have judges passing on what is or is not a matter of public interest. But absence of public interest is an element of the "private facts/public concern" cause of action, and a constitutionally required element at that. Therefore, unless the Court should decide that this tort cannot coexist in any form with the Constitution, someone must determine in lawsuits such as the instant one whether the injurious statement concerned a matter of public interest.

The concerns that the Court has expressed with respect to having judges make determinations as to public interest are even more pronounced if this issue is left solely to the jury. *Cf. Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, ——, 104 S. Ct. 1949, 1960-62 (1984); *id.* at —— n.2, 104 S.Ct. at 1969 n.2 (Rehnquist, J., dissenting). There is an obvious danger that juries would use the flexibility inherent in determining public interest to punish unpopular speakers or ideas. While the danger

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office); *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970) (use of word "blackmail" in rhetorical manner is not defamatory, as matter of constitutional law).

still exists if trial judges are called upon to make this determination, the danger can be controlled by appellate review more easily when the determination is embodied in a judge's order than when it is embodied in a jury verdict. Moreover, giving responsibility for making this determination in the first instance to the trial judge would lead to the evolution, through case-law development, of "rules of the road" to guide publishers and broadcasters. Such will never happen if the issue is always permitted to go to the jury.

Adopting a standard of "clear and convincing proof" with regard to actual malice and absence of public interest would also promote certainty and predictability and decrease the risk of self-censorship. Judging whether a particular statement will lead to liability in a "private facts/public concern" lawsuit is largely a matter of attempting to assess what the community considers to be appropriate to print. *See* Restatement (Second) of Torts § 652D comment h (1977). Because of the speculativeness involved in making such assessments, there is a strong argument that the "clear and convincing proof" standard is necessary to ensure that, in situations presenting a close call, publishers and broadcasters will not engage in self-censorship of information that the public has a legitimate right to know. Especially in this area of civil liability, the mere "preponderance of the evidence" standard is likely to induce speakers "to make only statements which 'steer far wider of the unlawful zone.'" *New York Times, supra,* at 279.

As to the third question presented, the constitutional privilege that the petitioner seeks to have this Court establish for identifying participants in case histories is an example of a "rule of the road" which publishers and broadcasters need to guide their editorial decisions. The justification for this privilege may be briefly stated. The Court frequently has noted that the historic function of the news media is to discuss "all issues about which in-

formation is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *see also, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967) (plurality opinion of Harlan, J.); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 75 (1960). Relatively few members of our society are scholars, however; most do not learn of the "exigencies of their period" through research on abstract issues, but rather through the concrete lessons of the experiences of themselves and others. The use of case histories to illustrate general articles plays a vital educational role in this regard. Requiring the news media to provide anonymity to participants in such case histories would have a serious deleterious effect on this educational function. In the words of the Iowa Supreme Court, identifying the participant "offer[s] a personalized frame of reference to which the reader [can] relate, fostering perception and understanding. Moreover, it len[ds] specificity and credibility to the report." *Howard, supra*, 5 Med. L. Rptr. at 1677. As a matter of constitutional law, such speech should be protected.

The Court has often remarked on the difficulty in defamation cases of establishing rules that would provide the needed "breathing space" for free speech while not creating a shelter for irresponsible or malicious speakers. *See, e.g., Hepps, supra*, at ——, 106 S. Ct. at 1564-65; *Gertz, supra*, at 342. The petitioner does not seek a shelter for irresponsible journalism. In the context of the instant case, the petitioner's only fault lay not in publishing an untruth, but rather in misjudging what truth the community, as represented by the particular jury drawn to decide this case, considers appropriate to print. It is ironic, to say the least, that the existing common law system of liability for publicizing truthful but private facts permits a publisher to identify the participants in any number of events that may be newsworthy but have

no real social or political significance,[17] but accords a jury virtually unfettered discretion to punish a publisher who uses a case history to illustrate a pressing and pervasive social problem. In reporting on a problem such as the subject of the article in this case, the press should not be required to thread its way through a minefield of privacy claims in its efforts to communicate effectively the nature and scope of the problem in ways that the reader will understand and remember.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to the Supreme Court of the State of South Carolina.

Respectfully submitted,

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September 10, 1986

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[17] *See, e.g.*, Restatement (Second) of Torts § 652D comment g (1977):

> "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' . . . Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophies of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."

APPENDIX

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APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CRAIG HAWKINS, by and through his Guardian ad Litem, Linda Hawkins,

Respondent.

vs.

MULTIMEDIA, INC.,

Appellant.

Appeal From Spartanburg County
Jonathan Z. McKown, Judge

Opinion No. 22496

Heard November 19, 1985—Filed March 11, 1986

AFFIRMED

David L. Freeman and Carl F. Muller, both of Wyche, Burgess, Freeman & Parham, of Greenville, for Appellant.

C. Robert Faucette and Terry Haselden, both of Faucette and Rudasill, of Spartanburg, for Respondent.

NESS, C.J.: This is an action by a minor child, respondent Craig Hawkins, against appellant Multimedia for invasion of privacy. Craig obtained a verdict against Multimedia for $1,500 actual and $25,000 punitive damages. We affirm.

Multimedia published a story in its newspaper concerning the problem of teenage pregnancies. A sidebar article identified Craig as the teenage father of an illegitimate child. The majority of the article focused on the unmarried teenage mother.

The teenage mother told Multimedia's reporter that Craig was the father of her child. The reporter called Craig's home, identified herself to Craig's mother and engaged her in conversation. She reached Craig in a later telephone call, identified herself and asked him questions. Craig was reluctant to answer questions and terminated the conversations in three or four minutes. In neither call did the reporter request permission to identify or quote Craig.

The trial judge charged the jury, over Multimedia's objection, that a minor cannot consent to an invasion of his privacy. Multimedia asserts this was error. We find it unnecessary to reach this issue. Invasion of privacy is a cause of action sounding in tort. *Rycroft v. Gaddy*, 281 S. C. 119, 314 S. E. 2d 39 (S. C. App. 1984). A defendant may avoid liability for invasion of privacy by showing the injured party consented to the publication of facts about his private life. 62 Am. Jur. 2d, *Privacy*, Section 18. Since consent is a matter to be raised by the defendant, it has the burden of proof on that issue. See, *O'Neal v. Carolina Farm Supply of Johnston*, 279 S. C. 490, 309 S. E. 2d 776 (S. C. App. 1983). Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice. 15A CJS, *Consent*, pp. 573-577.

Multimedia failed to introduce any evidence of Craig's consent. While Craig did not terminate the conversation immediately, it was brief and he was "very shy." The reporter never asked Craig if she could use his name in a newspaper article. Craig understood the newspaper was doing a "survey" on teenage pregnancy, and he was never

told he would be identified in an article. Since there was no evidence of Craig's consent, we need not decide the standard by which a minor's consent is to be determined.

Multimedia next asserts the trial judge erred in not directing a verdict in its favor because the matter reported was of general interest. The right of privacy does not prohibit the publication of matters which is of legitimate public or general interest. Public or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test. *Meetze v. Associated Press*, 230 S. C. 330, 95 S. E. 2d 606 (1956). *See* also, *Rycroft v. Gaddy, supra.* We held in *Meetze, supra,* that a twelve-year-old girl giving birth to a child was "biological occurrence which would naturally excite public interest." *Id.* at 610. Ordinarily, however, whether a fact is a matter of public interest is a question of fact to be decided by the jury. We find no error in submitting this issue to the jury.

Multimedia also asserts error in the refusal of the trial judge to charge that malice must be shown by clear and convincing evidence. Malice need not be shown to recover for invasion of privacy. 62 Am. Jur. 2d, Privacy, Section 15. Malice is relevant only when the plaintiff is seeking punitive damages. *Id.* Section 47. The issue of the burden of proof for punitive damages was not raised at trial, and may not be raised for the first time on appeal. *Hubbs v. Government Employees Insurance Company,* Op. No. 22442 (filed January 13, 1986).

Multimedia's remaining exceptions are without merit and are affirmed pursuant to Supreme Court Rule 23.

AFFIRMED.

GREGORY, HARWELL, CHANDLER and FINNEY, JJ., concur.

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
Clerk

BRENDA F. SHEALY
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
758-3741

May 13, 1986

David L. Freeman, Esquire
Carl F. Muller, Esquire
Post Office Box 10207
Greenville, South Carolina 29603

Re: Hawkins, etc. v. Multimedia, Inc.

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

/s/ J. B. Ness C.J.

/s/ George T. Gregory, Jr. A.J.

/s/ David W. Harwell A.J.

/s/ A. Lee Chandler A.J.

/s/ Ernest A. Finney, Jr. A.J.

May 13, 1986."

The remittitur in this matter is being forwarded to the Clerk of Court for Spartanburg County.

Sincerely yours,

/s/ Clyde N. Davis, Jr.
Clerk

CND,Jr/krp

cc: Terry Haselden, Esquire

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

C.A. No. 81-CP-42-1275-2

LINDA HAWKINS and CRAIG HAWKINS, by and through his Guardian ad Litem, LINDA HAWKINS,
Plaintiffs,

—vs—

MULTIMEDIA, INC.,
Defendant.

ORDER

These matters come before me through the post trial motions of the plaintiff, Linda Hawkins, and defendant in this case. At trial, the jury awarded the plaintiff Craig Hawkins, $1,500 actual damages and $25,000 punitive damages. In the case of the plaintiff, Linda Hawkins, the jury refused to award any damages.

At the conclusion of the trial, the defendant moved for judgement notwithstanding the verdict, and in the alternative for a new trial absolute or a reduction of the verdict as to punitive damages subject to a new trial nisi. Plaintiff Linda Hawkins moved for a new trial additur in her case. Counsel for both plaintiff and defendant have submitted briefs in support of their motions to aid the court in its determination of these matters.

Defendant's motion for judgement notwithstanding the verdict in the case of Craig Hawkins is denied. The defendant asserted that the published matter was true, of general interest, had previously been made public, and

that actual malice on the part of the defendant was not proven. However, truth is no defense to an action for invasion of privacy. *Meetze v. Associated Press*, 230 S.C. 303, 96 S.E. 2d 606 (1956). Actual malice is not a requisite element of the tort of invasion of privacy. *Middlebrooks v. Curtis Publishing Co.*, 281 F. Supp. 1 (D.S.C. 1968). The defendant's allegations of general interest and prior publicity are questions of fact upon which conflicting evidence was presented to the jury. The jury's verdict is supported by strong evidence which indicates that the published matter was not of general interest and had not been previously published to the entire community.

The defendant's motion for a reduction of the verdict is also denied. The argument by the defendant that the punitive damages must be reduced due to their disproportionality to actual damages is not supported by law. Our courts has repeatedly held that punitive damages need not be proportionate to the actual damages. *Thompson v. Home Security Life Insurance*, 271 S.C. 54, 244 S.E. 2d 533 (1978); *Hicks v. Herring*, 246 S.C. 429, 144 S.E. 2d 151 (1965); *Charles v. Texas Co., et al.*, 199 S.C. 156, 18 S.E. 2d 719 (1942). The case of *Campus Sportswear v. M. B. Kahn Construction Co.*, 515 F. Supp. 64, aff'd 644 F. 2d 877 (4th Cir. 1981) explains the factors to be considered in determining punitive damages:

> The admonitory function of punitive damages does not lend itself to formulation. For one thing, a survey of South Carolina cases indicates that there has never been an agreement on ratios. There is no definite mathematical rule as to the proportion that that [*sic*] punitive should bear to actual damages . . . . One must look to behavior, not to results, to determine the need to admonish and one must look to the wealth of the defendant to determine the amount which must be awarded to accomplish that result. 515 F. Supp., at 106

This court finds that the confidential matter of the published information, the defendant's status as a youthful private individual, the recklessness involved of the defendant's publication, and the magnitude of the defendant's wealth are all factors which justify the punitive damages award.

The defendant's assertion that a new trial should be granted on the basis that this court's refusal to instruct actual malice as an element of invasion of privacy is without merit. Our court has held that actual malice need not be proven in order to establish liability for an invasion of privacy. *Middlebrooks, supra.* While some United States Supreme Court authorities support the contention that malice is required as an element of proof in order to establish a cause of action, these cases are all defamation and defamatory false light invasion of privacy cases. The present case alleges no defamation. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1979), the U.S. Supreme Court held that actual malice is not an element of an invasion of privacy action involving a private citizen. The state interest in compensating injury to private citizens was held to require application of a different rule from that of public figures. The *Gertz* case, *supra*, held:

> States should retain latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual . . . and so long as they do not impose liability without fault the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 94 S. Ct., at 3010.

The defendant also asserts that this court improperly charged the jury when it charged that a minor could not give his own consent to allege to [*sic*] invasion of his pri-

vacy. *Dixon v. U.S.*, 197 F. Supp. 798 (D.S.C. 1962) held that:

> In the absence of bad faith, the doctrine of waiver or consent does not apply to a minor, nor can he consent to the violation of his rights, and his rights cannot be waived by persons not authorized by law [to] do so. 197 F. Supp. at 803

This court designed its jury instruction on consent in accordance with the holding in *Dixon, supra.* Therefore, its instructions were proper. Although the recent holding in *T. Z. Standard v. Shine*, Opinion No. 21792 (S.C. Sup. Ct. Sept. 20, 1982) held that a minor may be found negligent if his behavior does not meet a standard to be expected of a child of like age, experience, and intelligence, the *Shine* case does not address the issue of consent. The doctrine of negligence is not at issue in this case.

Plaintiff Linda Hawkins' post trial motion for a new trial additur is denied. Plaintiff Linda Hawkins asserts that the jury found for her as to liability yet awarded neither actual damages nor nominal damages. The verdict form returned by the jury in this case read as follows:

> We find for the plaintiff Linda Hawkins in the amount of 0 dollars actual damages and 0 dollars punitive damages.

At first glace, this appears to support the plaintiff's allegation, however, the verdict form provided to the jury failed to leave a space for the jury to find for the defendant in the case of Linda Hawkins by herself. Therefore, the jury's finding of no actual damages and no punitive damages was actually a finding for the defendant in this matter. The jury verdict in favor of the defendant in the case of plaintiff Linda Hawkins could have been based upon evidence in the record that her privacy was not invaded. Therefore, the plaintiff Linda Hawkins' motion for a new trial additur is denied.

WHEREFORE, all of the plaintiff's and the defendant's post trial motions in the above captioned case are denied and the verdict of the jury is upheld.

IT IS SO ORDERED.

/s/ Johnathan Z. McKown
JONATHAN Z. MCKOWN
Presiding Judge of the
7th Judicial Circuit

Dec. 11, 1983

Gaffney, SC

PREGNANCY JOINS LIST OF TEEN-AGE CONCERNS

Stories by LORI KEESEY
News staff writer

Mar. 15, 1981

Kimberly Harris, a precociously passionate teenager on the soap opera "Ryan's Hope," has experienced two pregnancies—one faked and the other aborted.

Rather racy stuff, one might assume.

But strip away the Hollywood embroidery and one bare fact remains. Kimberly Harris is not that unusual.

Every day, thousands of teen-agers discover they are pregnant.

And the problem is apparently growing.

At least 1 million teen-age girls between the ages of 15 and 19 get pregnant each year, a U.S. House select committee on population reported in 1978.

And a recent Johns Hopkins University study revealed that half of the nation's teen-age girls living in urban areas were no longer virgins.

Although more claimed to be using contraception on a regular basis than in previous studies, the report said the incidence of pregnancy among sexually active teenagers jumped from 28 percent in 1971 to 33 percent in 1979.

In South Carolina, the problem appears worse than in most other states.

"Forty-eight states in this country have less teen-age pregnancy than we do," said Dr. Harold Rubel, head of the obstetrics and gynecology department at Spartanburg General Hospital.

In the most recent statistics available, the state Department of Health and Environment Control reported three years ago that 10,430 babies were born to girls in the state age 19 and younger.

But the problem is more complex than a mere listing of numbers.

Teen-age pregnancies are considered high-risk pregnancies. Not only does the young mother face complicated health risks, but so does her child.

The problem also touches on economics, social attitudes and perhaps the most controversial question of all: Should schools get involved?

But one thing is certain. Teen-age pregnancy is an awesome problem and one that affects all segments of the population.

There aren't any easy answers, professionals say.

It is a well know fact, they say, that young girls stand a greater chance of giving birth to physically and mentally handicapped babies.

Eventually, their pregnancies become society's problems because the federal government requires all states to provide training for the handicapped, Rubel said.

Young mothers also are more likely to develop toxemia, anemia and prolonged labor. Toxemia is a form of blood poisoning considered to be extremely dangerous.

The infants of young mothers are two to three times more likely to die within the first year of life because of poor pre-natal and post-natal care, said Linda Anderson, coordinator of the Improved Pregnancy Outcome Project, a federal program.

The project was set up to help reduce the nation's infant mortality rate.

"You're talking about a community problem." The state's high infant mortality rate is directly linked to teen-age pregnancy, she said.

The mothers are "little kids and they (act) like little kids," Rubel said. "Their idea of good nutrition is a Pepsi and a moon pie."

Because many teen-agers wait well into their sixth or seventh month of pregnancy before seeking medical help, they do not benefit from medically supervised diets or child-care training.

Economic problems also arise.

Statistics provided by the Greenville-Pickens health district claim that nine out of every 10 pregnant girls under age 15 never finish school.

Many wind up on welfare roles because they lack job skills and child care services.

In light of these risks, why do the nation's teen-agers have the highest childbearing rate among teen-agers in the world?

"We are bombarded with sex now," Rubel said. "I don't think X-rated movies are as bad as what we see on television.

"Invariably through the course of a James Bond movie, he jumps in bed with a woman. Even commercials are very, very suggestive," Rubel added.

"Girls figure they have to be the same way," he said. "They know that's what boys like."

Society has changed as well.

"It's not a hushed subject," said Kitty Silverman, director of the family planning clinics for the Appalachia III Health District. "Schools don't think they should teach (sex education), but it's going on in the hallways."

Rubel believes teen-agers' access to money and transportation also have contributed to the problem.

Mrs. Silverman said there are also physical developments which account partly for the rising pregnancies among teen-agers.

Several decades ago, the average teen-age girl started menstruating when she was about 16. Now the average age is 12.2 years, she said.

She attributes the change to improved diets and food processing techniques.

And as the girls' bodies begin to change, so do their interests in boys.

They tend to be attracted to older males—the 16- and 17-year-olds who have reached a peak in sexual desire.

"That's the age we're saying no sex," Mrs. Silverman said.

Also, the stigma of an out-of-wedlock pregnancy no longer exists, said Sheila Howard, a nurse who runs the high-risk pregnancy clinic at Spartanburg General Hospital.

"It doesn't really bother (teen-agers)," Mrs. Howard said. "Adolescents are just having sex sooner and sooner."

Unless mores change, professionals believe there is little anyone can do to prevent a teen-ager from having sex.

But they insist the number of unwanted pregnancies can be reduced if schools, churches and parents take a more active role in teaching sex education.

"The thing is preventing (pregnancy)," said Peggy Bolin, a Spartanburg County District 3 School nurse.

"Parents need to understand that a third of the kids are naive. They don't know why they have a period. But as a parent, you don't always know where to go for information," she said.

And though many parents don't know how to explain human sexuality to their children, many of the same parents pooh-pooh the idea of schools getting involved.

As a result, sex education in the schools has become a volatile subject. And that volatility has forced Spartanburg County school officials to approach the topic in a variety of ways.

They range from virtually no sex education in District 2 to specific, detailed instruction in District 6.

About a year ago, a high school biology class in District 1 became the center of controversy when parents protested the explicitness of its nine-week sex education course.

The storm resulted in a committee, formed to devise a new sex education curriculum. The program is to begin this spring.

Many parents also fear that by teaching contraception and human sexuality, teen-agers will become promiscuous.

"That's not true," Rubel said. "Because kids aren't virgins when they come (to the hospital's high risk pregnancy clinic)."

"The only virgins we might see are the those who are getting ready to get married," Mrs. Silverman added.

Acceptance of sex education, however, has come a long way, Rubel said.

And because of South Carolina's minors law, which was passed several years ago, teen-agers have easier access to contraception.

If a doctor believes a patient needs his services, he doesn't need parental permission before providing that treatment.

But in spite of these strides, many young people are still misinformed.

"There are some kinds around South Carolina who do not know family planning services are available to them on a free basis," Rubel said.

'I THOUGHT ABOUT ASKING FOR BIRTH CONTROL PILLS'

Greer—Though her younger sister got pregnant at 12, Joanne Ballenger, 16, never dreamed it would happen to her.

Four months ago, the Byrnes High School sophomore gave birth to a 5-pound, 15-ounce baby girl, whom she named Tomeka.

And as the unmarried mother held her sleeping child recently, she seemed confident the child would neither change her lifestyle nor her future plans.

"It happens. You may as well not be ashamed about it," she said.

"I don't feel like a mother, (Tomeka) feels like someone else's child and I just keep her," Miss Ballenger added.

But when Miss Ballenger found out she was pregnant, she sang a different song. She was six months pregnant, and too far along to abort even if she wanted to.

"I was shocked," said 16-year-old Craig Hawkins, Tomeka's father.

However, Miss Ballenger registered more than just shock.

"At first I just hated (Craig)," she said. "I knew I wouldn't be able to go anywhere and he would."

At that point in her life, Miss Ballenger wasn't alone.

Each day hundreds of teen-agers find out they are pregnant. And probably many of them don't know how they got themselves into the predicament.

"These girls are ignorant of birth control," said Shelia Howard, a nurse who runs Spartanburg General Hos-

pital's high-risk pregnancy clinic, where Miss Ballenger received prenatal care.

"I had two girls who did not know how they got pregnant and one who thought her baby was a tumor," she added.

"I totally agree sex education should be taught at home," she said. "But there will always be those (parents) who don't."

Linda Hawkins is a parent who believes in spelling it out to teen-agers.

"I never kept anything away from my boys," said Craig's 40-year-old mother. "And I told them if you bring one in the world, you have to raise him."

But apparently her advice fell on deaf ears.

"I was disappointed in him," Mrs Hawkins said. "Craig is still a baby. He doesn't know how to be a daddy."

But Miss Ballenger doesn't foresee any problems raising Tomeka.

Her mother and sister take care of Tomeka while Miss Ballenger is in school, and she says she takes over from there.

Hawkins visits Tomeka about three times a week, and according to him, he plans to take care of the baby in any way he can.

Marriage is out of the question, Miss Ballenger added.

"I've got to finish college," she said. "I haven't even thought about getting married.

"Maybe later on I'll get married. I might even marry someone else (other than Hawkins)," she added.

"(The pregnancy) is more of my fault than anybody," Miss Ballenger said. "I thought about asking for birth control pills, but I never did."

But she said things turned out better than she originally thought.

"Usually when you get pregnant, everybody talks about you," she said. "But it turned out differently. It turned out a lot better than what I thought it would."

Miss Ballenger isn't the only mother at Byrnes High School.

Hawkins said people talk about their sexual escapades, and at least two of his friends are parents.

"And another (baby) is on the way," he said.